Kentucky Law Journal

Volume 35 | Issue 2 Article 11

1947

Necessity of Notice to a Guarantor of Acceptance of His Offer in Kentucky

William O. Gilbreath
University of Kentucky

NECESSITY OF NOTICE TO A GUARANTOR OF ACCEPTANCE OF HIS OFFER IN KENTUCKY

The law concerning the necessity of giving notice to a guarantor of the acceptance of his offer is in much confusion. The problem is most frequently encountered in cases involving guaranties of future advances. Before considering the rule in Kentucky, a brief survey should be taken of the various views on the problem.

Under the English view,[1] which is followed to a considerable extent in this country,[2] the contract is completed upon the doing of the act requested and notice to the guarantor of performance of the act is not necessary to hold him on his offer.

At the other extreme, the federal rule is to the effect that notice is necessary to the inception of the contract.[3] The federal courts seem to have applied the requirement of a bilateral contract to a unilateral offer.

Between these two extremes we find that Massachusetts holds the doing of the act as completing the contract, but subject to subsequent discharge of it unless the guarantee communicates notice of the performance of the act of acceptance to the guarantor within a reasonable time.[4]

The Massachusetts view is followed by Williston in his treatise on Contracts and by the American Law Institute.[5] An able criticism of this holding is found in the case of *Midland National Bank of Minneapolis* v. *Security Elevator Company and Others.*[6]

This case gave effect to the manifest intention of the parties as gathered from the custom of the trade and held that notice of acceptance was not necessary as a condition to holding the guarantor on his offer where the guaranty was of a current, continuing line of credit as required by banks and merchants. The court stated that:

---

[1] Oldershaw v. King, 157 Eng. Rep. 213 (1857); Oxley v. Young, 126 Eng. Rep. 734 (1786).

[2] London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164 (1899); Pressed Radiator Co. v. Hughes, 155 Ill. App. 80 (1910); Snyder v. Click, 112 Ind. 293, 13 N. E. 581 (1887); Lininger & Metcalf Co. v. Wheat, 49 Neb. 567, 68 N. W. 941 (1896); Union Bank v. Coster's Ex'rs, 3 N. Y. 203 (1850); Cowan v. Roberts, 134 N. C. 415, 465 S. E. 979 (1904); Powers v. Bumcraty, 12 Ohio St. 273 (1861); Yancey v. Brown, 35 Tenn. 89 (1855).

[3] Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. Ed. 480 (1885); Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. Ed. 686 (1881); Louisville Mfg. Co. v. Welch, 10 How. 461, 13 L. Ed. 497 (1850); Douglass v. Reynolds, 7 Pet. 113, 8 L. Ed. 626 (1833).

[4] Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665 (1884).

[5] 1 WILLISTON, CONTRACTS (Revised Ed., 1936), Secs. 68, 69; RESTATEMENT, CONTRACTS, sec. 56 (1932).

[6] 161 Minn. 30, 200 N. W. 851 (1924) .

> "In view of the obvious expectation of the parties, that the creditor will make good and the guarantors never be called upon to pay, it is futile to suggest, to say nothing of arguing, that notice of the actual giving of credit is intended as a condition, either precedent or subsequent, to the attaching and enforcement of the liability of the guarantor."[7]

The decisions in Kentucky are confused both as to the necessity of notice and as to what that notice is to include. Some cases have required notice of the guarantee's intention to accept,[8] while others have required notice of the specific advances made under the guaranty.[9] Still others have stated that notice of performance of the act requested was unnecessary, holding that a promise to pay on the default of the principal is an absolute guaranty.[10] The latest case where the Court of Appeals discussed the whole problem was the case of *McGowan* v. *Wells' Trustee*.[11] There the Court made a distinction between an "absolute guaranty," where notice was not required, and a "conditional guaranty," which made notice of the acceptance a condition precedent to holding the guarantor on the guaranty. In applying this distinction to the cases, the intention of the guarantor has to be ascertained in order to determine whether the guarantor's offer is absolute or conditional.

Since the question would be solved by the determination of the guarantor's intention as expressed in his offer, the distinction as made is purely formal and adds little to the solution of the problem.

It was stated in the *McGowan* case that no notice is necessary where the guaranty is executed and delivered simultaneously with the creation of the debt, or where the guarantor receives a consideration from the guarantee for his obligation, or where the guaranty is given to secure a pre-existing debt, or where a creditor requires the execution of a guaranty, or where the guaranty is absolute and unconditional and the obligation amounts to a primary obligation to pay the debt. The court gave as a reason for these statements that in these cases the guarantor either has notice of the acceptance or has waived it. It seems evident that the court extended the rule

---

[7] *Ibid* at 854.

[8] McGowan v. Well's Trustee, 184 Ky. 772, 213 S. W. 573 (1919); Greer Machinery Co. v. Sears, 119 Ky. 697, 66 S. W. 521 (1902); Thompson v. Glover, 78 Ky. 193 (1879); Lowe v. Beckwith, 53 Ky. 150 (1853); Steadman v. Guthrie, 61 Ky. 147 (1862); *Cf.* RESTATEMENT, CONTRACTS, KY. ANNOT. (1938) sec. 56.

[9] Ford, Eaton & Co. v. Harris, 102 Ky. 169, 43 S. W. 199 (1897); Gano v. Farmer's Bank of Kentucky, 103 Ky. 508, 45 S. W. 519 (1898); *Cf.* RESTATEMENT, CONTRACTS, KY. ANNOT. (1938) sec. 56.

[10] Pittsburgh Plate Glass Co. v. Cassidy, 194 Ky. 81, 238 S. W. 172 (1922); McGowan v. Well's Trustee, 184 Ky. 772, 213 S. W. 573 (1919); Watkins Medical Co. v. Brand, 143 Ky. 468, 136 S. W. 847 (1911); White Sewing Machine Co. v. Powell, 25 Ky. Law Rep. 94, 74 S. W. 746 (1903); *cf.* RESTATEMENT, CONTRACTS, KY. ANNOT. (1938) sec. 56.

[11] 184 Ky. 772, 213 S. W. 573 (1919).

governing notice of default in guaranty cases so as to make it applicable to notice of acceptance.

The language in some of the cases to the effect that the notice required is that of the guarantee's intention to accept the guarantor's offer is based upon a misconception of the reason for requiring such notice and of the law relating to the formation of unilateral contracts.[12] It seems settled that the notice, in order to be operative, must be that the act requested in the guarantor's offer has been performed.[13]

It is submitted that notice of the performance of the act requested should be required only where it is reasonably understood from the guarantor's offer that he expects notice. The intention of the offeror in view of the surrounding circumstances and the ordinary rules of contracts should govern. Where the parties do not contemplate the giving of notice, to make the enforcement of the contract depend upon the guarantee giving notice of his act of acceptance would be interpolating a requirement which was neither agreed to nor stipulated for, and a result of no contract where clearly, but for the interpolation, a valid contract was made.

However, in Kentucky, in cases other than those where it is said notice of acceptance is not necessary, the guarantee, to be sure of his ground, should give notice of the extension of credit of the advance in question.

WILLIAM O. GILBREATH

[12] *Supra* note 8.

[13] 1 WILLISTON, CONTRACTS (Revised Ed. 1936) sec. 69.